MOTION FILED
SEP 19 1986

NO. 85-2023

In the Supreme Court of the United States

OCTOBER TERM, 1985

KERR McGEE CORPORATION and
ZAPATA OFFSHORE COMPANY
Petitioners

VERSUS

TIMCO SERVICES, INC. and
ROYALE BELGE INSURANCE COMPANY
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September, 1986

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Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company, and Union Oil Company of California, hereby respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of Certiorari. The consent of the attorney for the Petitioners has been obtained and is reflected in a letter on file with the Clerk of the Supreme Court. The consent of the attorney for the Respondents was requested but refused.

Amici curiae are companies involved in the exploration and production of the resources of the Outer Continental Shelf. Each company is involved in numerous contracts directly effected by the decision below, which applied the Louisiana Oilfield Indemnity Act, La. Rev. Stat. § 9:2780 ("the Louisiana Indemnity Act"), in a case governed by the Outer Continental Shelf Lands Act, 67 Stat. 462, 483 U.S.C. § 1331 *et seq.* ("the Lands Act"). The Lands Act, however, forbids application of state law that is inconsistent with federal law, and *amici curiae* respectfully submit that the Louisiana Indemnity Act is inconsistent with both federal common law and the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* ("the Longshore Act").

The issue of the inapplicability of the Louisiana Indemnity Act on the Outer Continental Shelf has also been presented to this Court by the Petition for Writ of Certiorari filed by Gulf Oil Corporation in *Doucet v. Gulf Oil Corporation*, 788 F.2d 250 (5th Cir. 1986) (on application for rehearing), *cert. applic. pending* (No. 86-74), and *amici curiae* have filed a similar brief in support of Gulf's Petition for Writ of Certiorari in *Doucet*. As the same issue is involved in both cases, *amici curiae* request leave to file this brief beyond the normal time limit.

Petitioners herein, Kerr-McGee Corporation and Zapata Offshore Company, contend that the Louisiana Indemnity Act is inconsistent with federal common law and therefore inapplicable. *Amici curiae* wish to support that contention and wish to present the additional argument that the Louisiana Indemnity Act is inconsistent with the

Longshore Act. Either argument would be dispositive of this case, and *amici curiae* respectfully request leave to file the attached brief.

Respectfully submitted,

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STATEMENT CONCERNING INTEREST OF *AMICI CURIAE*

Amici curiae, Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company and Union Oil Company of California, are companies involved in the exploration and production of the resources of the Outer Continental Shelf. Each company is involved in many contracts directly effected by the decision below. *Amici curiae* have a vital interest in the proper interpretation of contracts governing operations offshore, and the rules of law used to interpret those contracts.

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BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY

Amici curiae[1] submit that the Fifth Circuit Court of Appeals in this case, as in the case of *Doucet v. Gulf Oil Corp.*, 788 F.2d 250 (5th Cir. 1986) (on application for rehearing), *cert. applic. pending* (No. 86-74), misinterpreted the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C § 1331 *et seq.* (the "Lands Act"), by relying on state law that is inconsistent with federal common law and the

[1] Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company, and Union Oil Company of California.

Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (the "Longshore Act").[2]

The Lands Act allows the use of state law only when there is no applicable federal law and only when the state law is "not inconsistent" with federal law. Federal common law, however, allows full contractual freedom with respect to contractual indemnity. Under *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), a party can be indemnified for its own negligence if such intent is clearly set forth in the applicable contract. The same is true, in the non-vessel context, under the Longshore Act. The Louisiana Oilfield Indemnity Act, La. Rev. Stat. § 9:2780 (the "Louisiana Indemnity Act"), which prohibits full indemnity, is inconsistent with federal law and cannot control in a case governed by the Lands Act.

REASONS FOR GRANTING THE WRIT

I. *LOUISIANA'S PROHIBITION OF CONTRACTUAL INDEMNITY CANNOT CONTROL ON THE OUTER CONTINENTAL SHELF BECAUSE LOUISIANA LAW CONFLICTS WITH APPLICABLE FEDERAL LAW*

"All law applicable to the Outer Continental Shelf is federal law." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 480, 101 S.Ct. 2870, 2876, 69 L.Ed.2d 784 (1981). If necessary, the Lands Act supplements "gaps in the

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[2] *Amici curiae* have filed this same brief in support of Gulf Oil Corporation's Petition for Writ of Certiorari in *Doucet v. Gulf Oil Corp.,* 788 F.2d 250 (5th Cir. 1986) (on application for rehearing), *cert. applic. pending,* (No. 86-74).

Federal law with state law through 'adoption of State law as the law of the United States, ' " *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357, 89 S.Ct. 1835, 1838, 23 L.Ed.2d 360 (1969), but "federal law is 'exclusive' in its regulation of [the Outer Continental Shelf], and . . . state law is adopted only as surrogate federal law." *Id.*

Any state law incorporated by the Lands Act must be consistent with federal law. *Rodrigue, supra*, 395 U.S. at 360, 89 S.Ct. at 1839-40.

> To the extent that they are applicable *and not inconsistent* with this subchapter or with other Federal laws and regulations of the Secretary . . . , the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added). Moreover, under *Rodrigue*, if there is applicable federal law, state law should not be used.

In *Rodrigue*, based on both traditional maritime principles and Congressional intent, this Court held that federal admiralty law does not govern accidents on "artificial islands" on the Outer Continental Shelf. This was not a rejection of federal common law but rather a recognition that maritime law did not extend to "accidents [that] had no more connection with the ordinary stuff of admiralty than to accidents on piers." 395 U.S. at 360, 89 S.Ct.at 1839-40. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414,

____, 105 S.Ct. 1421, 1426, 84 L.Ed.2d 406 (1985). *Rodrigue* concluded that *maritime law* was thus inapplicable to the plaintiff's non-maritime claim, and the resulting lack of applicable federal law "*remove[d] any obstacle* to the application of state law by incorporation as federal law through the Lands Act." 395 U.S. at 366, 89 S.Ct. at 1842 (emphasis added). Contrary to the Fifth Circuit's assertion in this case and *Doucet v. Gulf Oil Corp.*, 788 F.2d at 251-52, however, *Rodrigue* does not even mention federal common law and certainly does not hold that federal common law is inapplicable on the Outer Continental Shelf. As federal common law and the Longshore Act allow full indemnity, inconsistent Louisiana law cannot be relied on in a Lands Act case.

(a) Federal Common Law Allows Full Contractual Indemnity

The Louisiana Indemnity Act, La. Rev. Stat. § 9:2780, which precludes indemnity for one's own fault, directly conflicts with federal common law. *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), allows full indemnity when clearly provided for by contract and represents well-established federal common law. *See, e.g., Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 229 (5th Cir. 1985). In the instant case, however, the Fifth Circuit rejected *Seckinger's* applicability and held that, in any event, federal common law is in effect relegated to a status inferior to state law. In so holding, the court misapplied *Rodrigue* and the entire scheme of the Lands Act. Federal common law is "federal law." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 98-100, 92 S.Ct. 1385, 1390-91, 31 L.Ed.2d 712 (1972). Therefore, inconsistent state law must yield.

Whether federal common law can be ousted by inconsistent state law was specifically discussed but not decided in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). At issue in *Gulf Offshore* was whether the jury in a claim governed by the Lands Act should have been instructed, in accordance with federal common law,[3] that personal injury damage awards are not subject to federal income taxation.

> If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.
>
> But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. *The [Lands Act] does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," Liepelt controls.*

453 U.S. at 487, 101 S.Ct. at 2880 (emphasis added). Although this Court expressed a question as to whether federal common law would necessarily control that particular case, the issue was not decided because it was unclear whether Louisiana law was in fact inconsistent with *Liepelt*.

The Fifth Circuit in *Olsen v. Shell Oil Co.*, 708 F.2d 976, 982-83 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984), subsequently rejected the federal common law rule of *Liepelt* on the ground that the

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[3] *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

underlying cause of action was derived from state law under the Lands Act. In so holding, the Fifth Circuit relied on its contention that state law governing admissibility of evidence concerning inflation was an integral component of the state law cause of action and that under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the *Liepelt* rule should yield to state law.

The Fifth Circuit in *Olsen*, however, misapplied *Huson*. In *Huson*, this Court held that when a cause of action for personal injury occurring on a fixed platform is based on state law, state law should provide the limitations period as well, "*subject to the absence of* inconsistent and applicable federal law." 404 U.S. at 103, 92 S.Ct. at 354 (emphasis added). As admiralty law was inapplicable under *Rodrigue*, there was no applicable federal limitations rule. Finding it inappropriate to create new federal common law, *Huson* looked to the state limitations period. Neither *Huson* nor *Rodrigue* denegrated the role of federal common law on the outer Continental Shelf; *Rodrigue* merely held "admiralty" law inapplicable to "artificial islands," and *Huson* held that because there was a "gap," it was more appropriate to rely on state law than *to create* new federal common law. Neither *Rodrigue* nor *Huson* sanctions the use of state law *that is inconsistent with established federal law,* as evidenced by the fact that the question surfaced in *Gulf Offshore,* ten years after *Huson. Huson's* decision not to create *new* federal common law is irrelevant when there is already well-established federal common law such as *Seckinger.* The Fifth Circuit 's decision in *Olsen* was therefore incorrect, and the question left open in *Gulf Offshore* must be answered.

Even if *Olsen's* rationale were correct, the critical underpinning of the decision -- that the state rule on inflation was an integral component of the underlying state law cause of action -- is not present in this case. The indemnity rule of *Seckinger* is not an integral component of any particular cause of action but rather constitutes an important part of the federal law governing contract interpretation. As stated in numerous cases following *Seckinger*,[4] the intent of the parties, when clearly expressed, should be enforced, including the intent to provide complete indemnity.

In light of *Seckinger*, there is no "gap" in this case. Moreover, ignoring such a federal rule of contract interpretation carries implications far beyond the subject of this case. That would give states adjacent to the Outer Continental Shelf the power to overrule federal law. Prior to the Louisiana Indemnity Act, Louisiana allowed complete indemnity. Louisiana decided to change its own law, but the Louisiana legislature does not have the power to overrule federal law on the Outer Continental Shelf -- particularly not when the Lands Act mandates that any incorporated state law must be consistent with federal law.

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[4] *See, e.g., Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 229 (5th Cir. 1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132, 135 (3rd Cir. 1985); *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427, 1430 (3rd Cir. 1985); *Gibbs v. United States*, 599 F.2d 36, 40-41 (2d Cir. 1979); *Smith v. United States*, 497 F.2d 500, 509 (5th Cir. 1974); *United States v. Hollis*, 424 F.2d 188, 190-91 (4th Cir. 1970).

(b) The Longshore Act, In the Non-Vessel Context, Allows Full Contractual Indemnity

The Louisiana Indemnity Act not only conflicts with *Seckinger*, it conflicts with the entire scheme of the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (the "Longshore Act"). The jurisprudential development and legislative history of the Longshore Act show that contractual indemnity is available except where specifically prohibited.

Section 905(a) of the Longshore Act[5] provides that an employee's exclusive remedy against his employer shall be that provided in the Act. This exclusivity provision precludes any claim for *tort* indemnity against an employer by a third party defendant. *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1021-22 (1st Cir. 1985) *cert. denied*, ___ U.S. ___, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 719-22 (2d Cir. 1978); *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Service, Inc.* 377 F.2d 511, 512 (5th Cir.), *cert. denied*, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967).

In contrast, however, full *contractual* indemnity is available under section 905(a), including indemnity for the fault of the indemnitee when clearly provided for by contract. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 386-88 (5th Cir. 1981); *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1103-04 (5th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 721-22 (2d Cir. 1978). The Louisiana Indemnity Act is

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[5] 33 U.S.C. § 905(a).

therefore inconsistent with the Longshore Act.

The availability of contractual indemnity is underscored by the legislative history of the Longshore Act. Prior to the 1972 amendments to the Longshore Act, the combination of implied contractual indemnity under then section 905 (now section 905(a)) and the effect of this Court's decisions in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), had given rise to the so-called *Sieracki-Ryan* triangle. Under *Sieracki*, a longshoreman doing work customarily performed by a seaman was owed a warranty of seaworthiness by the vessel, which gave rise to liability without fault. Under *Ryan*, however, the vessel owner was entitled to implied contractual indemnity from the longshoreman's employer, based on the breach of an implied warranty of workmanlike performance. As a result, the employer was liable for compensation under the Longshore Act but was also often required to indemnify the vessel owner for the employee's tort recovery.

The *Sieracki-Ryan* triangle was terminated with the 1972 amendments to the Longshore Act. Congress reenacted the previous section 905 as section 905(a) and added section 905(b). Section 905(b) prohibited a "vessel" from obtaining any indemnity from the employer of the injured longshoreman, whether based on an implied or express contractual provision. There was no change, however, in the right of a "non-vessel" to obtain contractual indemnity. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 719-22 (2d Cir. 1978).

> The shipowners got a *quid pro quo* for the loss of their indemnity rights. Prior to the 1972 amendments they were liable to injured longshoremen not only for the ship's own negligence but also on a strict liability theory (the "unseaworthiness" doctrine) for conditions which often were actually created by the stevedore. . . . The 1972 amendments eliminated the unseaworthiness theory and limited vessel liability to negligence in exchange for the surrender of the vessel's indemnity rights. . . . *No such quid pro quo was offered to non-vessels.* Given the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that section 905(b) by its own force cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees, . . . where there is a direct contractual relationship between the third party and the stevedore or where the third party is designated as a beneficiary of an express contract between the stevedore and a vessel.

Id. at 721-22 (citations and footnote omitted) (emphasis added). The Fifth Circuit, relying on *Zapico*'s rationale, has agreed.

> Until Congress more specifically abrogates this judicial remedy of contractual indemnity owed to nonvessels by the employer, it would appear to continue to be available.

Pippen v. Shell Oil Co., 661 F.2d 378, 387 (5th Cir. 1981). *See Olsen v. Shell Oil Co.*, 595 F.2d 1009, 1103-04 (5th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

Congress again amended section 905 of the Longshore Act in 1984. Section 905(c) was added to allow a "vessel" to obtain contractual indemnity in the context of a reciprocal indemnity provision. Again, however, there was no change in the availability of contractual indemnity by a non-vessel under section 905(a). When Congress amends or reenacts a statute without changing well-established jurisprudence, Congress must be considered to have ratified that jurisprudence. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-73, 99 S.Ct. 2753, 2762-63, 61 L.Ed.2d 521 (1979).

The Longshore Act allows complete contractual indemnity under section 905(a). Such evidence of Congressional intent cannot be ignored by a state legislature. No such result is required by or sanctioned by the Lands Act, which incorporates state law only when necessary and only when "not inconsistent" with federal law. 43 U.S.C. § 1333(a)(2)(A).

CONCLUSION

As stated by this Court in *Rodrigue*, Congress enacted the Lands Act to define the law applicable to the Outer Continental Shelf. 395 U.S. at 355, 89 S.Ct. at 1837. In so doing, Congress chose to rely on state law to fill gaps -- not to oust applicable federal law allowing freedom of contract. The exploration and development of the resources of the Outer Continental Shelf requires extensive financial commitment and the coordination of numerous companies providing an almost unlimited range of services. The development of the Shelf's resources has spawned many different companies, performing various services, pursuant to numerous different contracts. The indemnity provisions in those contracts, like all the other provisions, should be

interpreted in accordance with the intent of the parties when clearly expressed. These indemnity provisions are important in allowing the parties to a contract to allocate their respective risks of liability.

Seckinger and the Longshore Act permit such contractual allocation of risk. The *Seckinger* rule on indemnity is a single, but important, facet of the general rule of contractual freedom. The Louisiana legislature does not have the power to oust such federal law.

Uniformity may not be required in determining whether a person injured on a fixed platform off the coast of Louisiana has the same limitations period for bringing an action, or the same damage instructions to the jury, as an individual injured on a platform offshore Texas. However, basic uniformity is essential in interpreting contracts that govern economic development of the entire Outer Continental Shelf. That the Lands Act contemplated use of divergent state laws as federal law *in appropriate instances* does not justify ignoring the fact that the Lands Act incorporates state law only where "not inconsistent with [the Lands Act] or with other federal laws,"[6] whether it be the federal common law, the Longshore Act, or other federal laws.

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[6] 43 U.S.C. § 1333(a)(2)(A).

The Louisiana Indemnity Act is inconsistent with federal law. It therefore cannot apply on the Outer Continental Shelf.

Respectfully submitted,

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